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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 110

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

C. E. NIEHOFF & CO.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION OF C. E. NIEHOFF & CO. FOR REHEARING.

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THE CHURCHILL-HAUSER PRINTING COMPANY, CHICAGO

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In the *per curiam* opinion of January 27, 1958, jointly deciding this case and the case of *Moog Industries, Inc.* v. *Federal Trade Commission* (No. 77), this Court overlooked the fundamental record differences in these two cases which require an affirmance of the *Niehoff* case.

In the *Niehoff* case the Court of Appeals for the Seventh Circuit, in reviewing the action of the Federal Trade Commission, found as a fact from the undisputed evidence in the record that Respondent would be forced out of business by an order of the Commission compelling it forthwith to cease using the pricing methods traditional in the automotive ignition field while its principal competi-

tors were not under a similar restraint, and the inference is inescapable that it also found that the action of the Commission in refusing to exercise its statutory authority to postpone the effective date of the *Niehoff* cease and desist order under such circumstances clearly amounted to an abuse of discretion (R. 1040, 1042).

Where, as here, the record abundantly supports such a finding (R. 208, 209, 456-460, 578-586), the Court of Appeals has the unquestioned power to correct such an abuse of discretion. *Jacob Siegel Co. v. Federal Trade Commission*, 327 U. S. 608 (1945).

Nor will this Court interfere with such a finding by the Court of Appeals, for Congress has charged the Court of Appeals with the primary responsibility for reviewing the actions of administrative agencies and where the Court of Appeals has undertaken to make findings based upon the record this Court will do more than decide whether there was a "fair assessment" of the record. See *Federal Trade Commission v. Standard Oil Co.*, No. 24, October Term 1957; *Labor Board v. American Insurance Co.*, 343 U. S. 395, 409-410 (1952); *Labor Board v. Pittsburgh S. S. Co.*, 340 U. S. 498, 502-503 (1951); *Labor Board v. Universal Camera Corp.*, 340 U. S. 474, 491 (1951).

The Federal Trade Commission succeeded in clouding the issue in the *Niehoff* case by inviting this Court to grant certiorari in the *Moog* case on the Commission's assertion that the decision of the Court of Appeals for the Eighth Circuit in that case was "in conflict" with the decision of the Court of Appeals for the Seventh Circuit in the *Niehoff* case.[1]

Actually, no such conflict ever existed. An examination of the record in the *Moog* case discloses that Moog not only failed to make any proof that it would suffer irrepar-

1 See pages 9 and 10, Memorandum of the Federal Trade Commission in answer to the petition for certiorari filed in *Moog Industries, Inc. v. Federal Trade Commission*, No. 750, October Term 1956.

able injury through the immediate enforcement of the Commission's order, but that Moog never even suggested this possibility to the Commission or the Court of Appeals by motion or otherwise until after the Court of Appeals for the Eighth Circuit had released its opinion in that case.

When this point is raised for the first time in the Court of Appeals without supporting proof in the record, it comes too late.

The Court of Appeals for the Seventh Circuit readily recognized this distinction in its consideration of the case of *P & D Manufacturing Co.* v. *Federal Trade Commission*, 245 F. 2d 281, 282, decided April 30, 1957. There the Court, speaking through Judge F. Ryan Duffy, stated:

> "On oral argument petitioner's counsel requested that we adopt here the same procedure as we did in the *Niehoff* case, that is, postpone the effective date of the Commission's order until some indefinite time in the future.
>
> "In *Niehoff* there was evidence in the record that C. E. Niehoff & Co. would be forced out of business if the traditional pricing practices which it then followed would be denied to it, while its competitors were left free to continue such practices. No such proof or argument was made in the case at bar. The suggestion made at time of oral argument comes too late."

It is thus apparent that there has never been any "conflict" between the decision of the Eighth Circuit in the *Moog* case and the decision of the Seventh Circuit in the *Niehoff* case, and that the Commission obviously invited this Court to grant certiorari in the *Moog* case, not because of any actual conflict, but to tar the *Niehoff* case with the Moog record in the ultimate consideration here of the *Niehoff* case.

It is submitted that the decision of the Court of Ap-

peals for the Seventh Circuit in the *Niehoff* case, when considered on the record in that case alone, should be affirmed.

For the foregoing reasons we respectfully request the Court to grant a rehearing of its decision in the *Niehoff* case.

Respectfully submitted,

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Attorneys for Respondent.

I hereby certify that this petition for rehearing is presented in good faith and not for purposes of delay.

CHARLES R. SPROWL.

February 17, 1958.